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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. **76-1078**

RICHARD DEVINCENT AND ROBERT VISCONTI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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No.

RICHARD DEVINCENT AND ROBERT VISCONTI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners Richard DeVincent and Robert Visconti respectfully pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the First Circuit entered on December 8, 1976.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A (App. 1a-8a).

Jurisdiction.

The judgments sought to be reviewed were entered by the United States Court of Appeals for the First Circuit on December 8, 1976. No petition for rehearing was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Pursuant to applications filed by each Petitioner, this Court, per Brennan, J., as Circuit Justice, granted extensions of time to and including February 4, 1977, for each petitioner to file a petition for writ of certiorari.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Questions Presented for Review.

1. Under the statutory presumption contained in 18 U.S.C. § 892(b), does the use of a creditor's reputation as to collection practices to support a presumption regarding his state of mind with respect to a particular loan violate due process of law?

2. Under the statutory presumption contained in 18 U.S.C. § 892(b), does the existence of a civilly uncollectible loan in excess of $100 at an interest rate in excess of 45 per cent

support an inference beyond a reasonable doubt that the lender contemplated the use of criminal means of collection at the time the loan was made?

3. Under the statutory presumption contained in 18 U.S.C § 892(b), does it follow more likely than not upon proof of the existence of a civilly uncollectible loan in excess of $100 at an interest rate in excess of 45 per cent that the lender contemplated the use of criminal means of collection at the time the loan was made?

4. In a prosecution under 18 U.S.C. § 892, does the potential prejudice to a defendant creditor from admitting into evidence testimony by a debtor about the defendant creditor's prior indictment for murder require the trial judge to consider, before admitting the evidence, a prior inconsistent statement by the debtor which if true would render the evidence wholly inadmissible?

Constitutional Provision and Statute Involved.

The due process clause of the Fifth Amendment to the United States Constitution is involved. The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. §§ 891 and 892 are involved. The text of those sections is attached hereto as Appendix B (App. 9a-12a).

Statement of the Case.

The petitioners were both charged with various violations of 18 U.S.C. Chapter 42 (Extortionate Extensions of Credit). Following a jury trial in the District of Massachusetts before Caffrey, C.J., both Petitioners were convicted of conspiring to make and of making an extortionate extension of credit in the form of a $700 loan to Peter J. Pallotta in violation of 18 U.S.C. § 892. They were acquitted of the remaining charges.

In view of the likelihood that the government would attempt to introduce evidence at the trial relating to the past bad acts and possible reputations of the Petitioners, motions were filed requesting the court to co duct a preliminary examination of such evidence to determine whether it was admissible. The motions and the accompanying memorandum of law listed various factors necessary properly to evaluate the probative value against the prejudicial impact of the anticipated evidence. Among these factors listed was the importance of assessing the reliability of the proffered evidence prior to its admission.

At the trial evidence was introduced by the government to establish the amount of the loan and the interest rate on the loan (4 per cent per week). The parties stipulated that the loan was uncollectible by civil process in the Commonwealth

of Massachusetts. The remaining evidence against the Petitioners came essentially from the testimony of Mr. Pallotta.

Pallotta testified not only to the circumstances of the loan but also to his beliefs about the Petitioners' criminal records and reputations. He testified to knowing of Petitioner Visconti's having been convicted of loansharking and to having been told that Visconti was a "loanshark enforcer." He testified to knowing of Petitioner DeVincent's twenty-year-old armed robbery conviction and a previous conviction for loan sharking, and to DeVincent's reputation as a "head-crusher, loanshark enforcer."

When Pallotta testified that he knew DeVincent had ten years earlier been indicted for murder, the court admitted that testimony into evidence over the objections of defense counsel. During the bench conference at which the court heard argument as to the admissibility of the evidence, counsel for Petitioner DeVincent attempted to raise the fact that Pallotta had previously made statements indicating that he was unaware of the indictment at the time the loan was made. The statements had been made in a telephone conversation with Edward Miani, which federal authorities had monitored and recorded. The court refused to consider the prior statements on the question of admissibility and stated that those statements were relevant only to the jury's assessment of Pallotta's credibility.

In charging the jury, the court gave an instruction, not requested by the government and based on 18 U.S.C. § 892(b), that the Petitioners could be found guilty of making extortionate extensions of credit solely upon proof that a loan in excess of $100 was made by Petitioners at a rate of interest in excess of 45 per cent per annum, that the loan was civilly uncollectible, and that Mr. Pallotta had a reasonable belief either that the Petitioners had used criminal means of enforcement in the past or that they had a reputation for doing so.

Throughout the trial the court gave repeated instructions that the evidence of Petitioners' past acts and reputations was admitted for the limited purpose of establishing Pallotta's state of mind and that it was to be considered for no other purpose. The court repeated that instruction in its charge to the jury.

Reasons for Granting the Writ.

A. The Opinion of the Court of Appeals for the First Circuit is in Conflict with the Congressional Intent Embodied in the Statutory Presumption, the Holding of this Court in Michelson v. United States, 335 U.S. 469 (1948), and the Repeated Cautionary Instructions of the Trial Judge.

In 18 U.S.C. § 892(b) Congress established a statutory presumption that an extension of credit could be found to have been "extortionate" upon proof of four basic facts: (1) the civil uncollectibility of the extension of credit; (2) an interest rate in excess of 45 per cent per annum; (3) the debtor's belief that the creditor had used or had a reputation for using criminal means of collection; and (4) a total amount extended in excess of $100.

While the statute appears on the surface to create a single presumption, using the four basic facts to support the single presumed fact of "extortion," there are under the statute not one but two presumed facts. Section 891(6) of the statute defines "extortionate" as a function of the states of mind of both the creditor and the debtor at the time an extension of credit is made. Both must have the "understanding" that criminal means of enforcement could be used, "understanding"

not in the sense of agreement but rather as individual comprehension. *United States* v. *Annoreno*, 460 F. 2d 1303, 1308-9 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972). In the opinion below (App. 3a, footnote 2), the Court of Appeals recognized that the understanding of each party to the transaction was a separate element of the crime.

Thus the four basic facts enumerated in Section 892(b) are intended to support presumptions of (1) the creditor's understanding of the transaction; and (2) the debtor's understanding of it. This is clear from the Conference Committee Report on the legislation which became 18 U.S.C. Chapter 42 (Extortionate Credit Transactions). In that report the Committee isolated the separate inferences in the presumption and pointed out which basic facts supported each inference.

> "In arms length transactions, people simply do not lend sums of money at exorbitant rates of interest under circumstances where they cannot enforce the obligation to repay. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated." Conf. Rep. No. 1397, 90th Cong., 2d Sess. (May 20, 1968), 1968 U.S. Code Cong. & Admin. News, 2021, at 2026-27.

The inference as to the creditor's state of mind is clearly made to rest on only three of the four basic facts in the statute. The remaining factor, the debtor's beliefs about the creditor's collection practices, is used only to infer the debtor's state of mind.

> "Any debtor who deals with a creditor under these circumstances, knowing or reasonably believing that the

> creditor has used extortionate means in the past, may be fairly surmised to know what he is getting into." 1968 U.S. Code Cong. & Admin. News, at 2027.

This exclusion of the debtor's beliefs about the creditor's reputation from the inference to the creditor's state of mind is consistent with the proscription in *Michelson* v. *United States*, 355 U.S. 469, 475-76 (1948), against the use of reputation as a part of the government's case-in-chief to prove the defendant's propensity to commit the crime with which he is charged. That proscription is reflected in the repeated instructions by the trial judge that the jury was not to consider the debtor's testimony as to his beliefs about the creditors' reputations and past practices for any purpose other than establishing the debtor's own state of mind.

Yet in its summary affirmation of the constitutionality of the statutory presumption in Section 892(b) "[u]nder either a rational connection or a reasonable doubt standard" (App. 4a), the Court of Appeals completely ignored the prohibitions of this Court and the caution of the trial judge. Despite having, only two pages before, discussed the understanding of each party as a separate element of the offense, the Court of Appeals upheld the statute as though it involved no more than a single permissible inference from the four basic facts.

> "When a man with a reputation for violent collection tactics loans more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is 'extortionate' within the meaning of § 892." (App. 4a.)

The superficial appeal of the view expressed by the Court of Appeals comes from reading "extortionate" in its common meaning rather than as a term with an explicit statutory definition. By not discussing the presumption in light of the two separate essential elements included in the term "extortionate," the Court of Appeals *sub silentio* employed the reputations of the Petitioners to prove their states of mind. The court had in fact earlier stated its belief that Section 892(b) was enacted specifically to overcome the difficulty of proving the "understanding of the creditor" directly (App. 2a).

While the error of the Court of Appeals in failing to assess the constitutionality of the statutory inference as to the creditors' states of mind without using the evidence of their reputations may have been inadvertent, under Local Rule 15 of the First Circuit the Petitioners were precluded from raising the matter in a petition for rehearing because the argument as to the proper analysis of the statutory presumption had already been presented to that court in the briefs of appellants. Thus, the Petitioners' only recourse is to petition this Court for a writ of certiorari so that this Court can either make its own determination of the constitutionality of the statutory presumption or remand the case to the Court of Appeals to allow that court to revise its opinion in the light of the conflicts with legislative intent, *Michelson*, and the instructions of the trial judge.

B. The Importance of a Definitive Determination of the Constitutionality of the Statutory Presumption in 18 U.S.C. § 892(b).

Chapter 42 (Extortionate Credit Transactions) of Title 18, United States Code, was passed by Congress as an integral part of the Consumer Credit Protection Act, Pub. L. 90-321, May 29, 1968, 82 Stat. 159, and was considered to be one of

the more important protections afforded the consumer under that act. See 114 Cong. Rec. 14390. Chapter 42 was enacted and its constitutionality upheld on the rationale that the loan sharking activities of organized crime were a serious impediment to the operation of the bankruptcy laws and had a substantial impact on interstate commerce. See: 1968 U.S. Code Cong. & Admin. News, at 2025-26; and *Perez* v. *United States*, 402 U.S. 146 (1971). The loan sharking provisions of the act were directed at "one of the principal sources of revenue of organized crime," and Section 892(b) was enacted "in order to provide the Department of Justice with the means for enforcing [those] provision[s]." 114 Cong. Rec. 14490.

Despite the obvious importance of Chapter 42 in combatting organized crime and the essential role in that effort which Congress envisioned for Section 892(b), the opinion below is the first reported decision dealing with the constitutionality of the statutory presumption. While it is unclear why no federal court appears to have dealt with this issue previously, whether because trial judges have avoided instructing juries on the basis of the presumption or because the issue simply was never raised by a defendant, it would be reasonable to assume that in future prosecutions under the statute trial judges, assuming in reliance upon the opinion below that the constitutional issue is settled, may well be inclined to instruct every jury on the statutory presumption. The danger of this occurring lies not only in the possibility that in the future persons accused of violating the statute may be convicted by the use of a constitutionally questionable provision of that law but also in the very real risk that numerous future convictions may have to be overturned because the issue of the constitutionality of the statutory presumption was not properly resolved when first presented.

In addition to the importance of the questions presented to law enforcement, there is the importance of those questions to

constitutional law generally. In *Leary* v. *United States*, 395 U.S. 6 (1969), this Court established a minimum constitutional standard by which presumptions in criminal cases were to be governed. Unless a presumed fact can be said to flow more likely than not from the basic facts upon which it is made to depend, the presumption is unconstitutional. In *Leary* (395 U.S. at 36), and again in *Barnes* v. *United States*, 412 U.S. 837, 842-43 (1973), this Court expressly reserved the question whether, when the presumed fact is also an essential element of the crime charged, presumptions in criminal cases must also meet the more rigorous beyond-a-reasonable-doubt standard. Cf. *In re Winship*, 397 U.S. 358 (1970). Petitioners have been able to find no case since *Barnes* was decided in which a presumption was found to meet the more-likely-than-not test but to fail the beyond-a-reasonable-doubt test.

When the presumption in Section 892(b) as to the creditor's contemplation of criminal means of collection is viewed as based upon only the amount of money involved, the interest rate on the loan and the civil uncollectibility of the loan — and not upon the creditors' reputations as well — it becomes apparent that the presumption may well fall in that gray area between the *Leary* test and the *Winship* standard if it passes muster under *Leary* at all.

C. The District Court's Refusal to Consider the Prior Inconsistent Statement of the Debtor Witness on the Question of the Admissibility of the Witness's Testimony as to his Knowledge of the Creditor Defendant's Past Indictment for Murder was Improper and was Inconsistent with Decisions of the Courts of Appeals for the Seventh, Eighth, Tenth and District of Columbia Circuits.

As the Petitioners pointed out to the District Court in the memorandum of law which was submitted with their motions

for preliminary examination of evidence of past crimes and bad acts, the ultimate decision to admit such evidence is a matter of judicial discretion, but a trial court is required to take into account and to weigh a number of factors in making its determination on admission. In addition to other considerations (such as relevance, probative value, remoteness and prosecutorial need) to be weighed against the prejudice to a defendant, a trial court should assess the reliability of the evidence sought to be admitted. *United States* v. *Bailey*, 505 F. 2d 417, 420 (D.C. Cir. 1974), *cert. denied sub nom. Sloan* v. *United States*, 420 U.S. 961 (1975).

At the trial of the instant case the Petitioners did not dispute that the Petitioner DeVincent had in fact been indicted (and acquitted) for murder some ten years earlier. However, there was a serious question whether Pallotta knew of the indictment at the time the loan was made.

The District Court's refusal to consider Pallotta's prior inconsistent statements on the question of admissibility not only conflicts with the decision of the District of Columbia Circuit in *Bailey*; it is also inconsistent with decisions in the Seventh, Eighth and Tenth Circuits on a closely related question. In *United States* v. *Ostrowsky*, 501 F. 2d 318, 321 (7th Cir. 1974), *United States* v. *Clemons*, 503 F. 2d 486, 490 (8th Cir. 1974), and *United States* v. *Burkhart*, 458 F. 2d 201, 205 (10th Cir. 1972), those courts held that when evidence of prior crime is being used to prove an element of the crime charged, the risk of prejudice requires that that evidence meet a "clear and convincing" standard of proof before it is admitted.

In those cases, the relevance of the proffered evidence depended upon the fact that the other crimes were committed rather than, as in the case at bar, upon the fact of the witness's knowledge of the other occurrence, but logic requires imposition of the same standard of reliability in both instances. In either situation the risk of undue prejudice is the reason for

caution. To guard against this risk the courts have taken what would otherwise be merely a question of credibility (if the evidence of other crime is in the form of testimony) to be decided by the jury and made it a preliminary matter to be determined, in the first instance at least, by the trial judge. If the ability of the evidence to establish the proposition for which it is offered is less than "clear and convincing," it must be excluded under *Ostrowsky*, *Clemons* and *Burkhart*. The same rule should apply, whether the proposition sought to be established is the fact of the other crime or the fact of the witness's knowledge, where the risk of prejudice is the same.

In the present case, if the debtor witness, Pallotta, knew of the murder indictment at the time the loan was made, then that evidence may certainly have been relevant to Pallotta's state of mind at the time the loan was made. On the other hand, however, if he did not know of the indictment at the time, as indicated by his statements during the phone conversation with Miani, the fact of DeVincent's indictment had absolutely no relevance whatever to the trial of the case.

The District Court was of the view that the prior inconsistent statements related only to the issue of credibility as a question of fact to be resolved by the jury. The court thus ignored the fact that, although the jury might determine that Pallotta did not know of the indictment and that his understanding of the transaction with Petitioners was not affected thereby, the prejudice from the jury's knowledge of the murder indictment would remain undiminished.

At one point in the opinion below, the Court of Appeals suggests that the trial court may have reasoned that the testimony about the murder indictment was remote and cumulative and that therefore any prejudicial impact would be minimal as well. The testimony was cumulative, the Court of Appeals felt, because of other testimony by Pallotta that he believed DeVincent to be a "head-crusher, loanshark enforcer"

and that he knew of DeVincent's and Visconti's prior convictions for loan-sharking (App. 7a).

That analysis conflicts not only with reason but with the record as well, and with the trial judge's own explanation of his reasons for admitting the murder-indictment testimony. After hearing argument from counsel at a bench conference on the admissibility of the evidence, Judge Caffrey stated:

> "Let me tell you this: In terms of the state of mind of the victim, I have received a threatening letter right within the last two weeks from a fellow I gave a long sentence to who was previously acquitted in Suffolk. And, if you don't think I have in mind the fact that that fellow was charged with murder and was acquitted as bearing on the type of guy that is writing me threatening letters, you are not very realistic." Tr., First Day of Jury Trial, p. 46.

That assessment of the impact of the murder indictment indicates that it was far from being "remote and cumulative."

Also the existence of the murder indictment would have prejudiced the jury far more than Pallotta's bald assertions that DeVincent was thought to be a "head-crusher." Contrary to the Court of Appeals statement, at the time the murder indictment was first mentioned by Pallotta, there had been no evidence presented of DeVincent's loan-sharking conviction. Visconti's so-called "loan-sharking conviction" was a conviction for violating the state small loans act which has nothing to do with violence or extortion but punishes the making of loans under $3,000 at interest rates in excess of 12 per cent per annum. In the light of Judge Caffrey's own comments it can hardly be doubted that a jury would be

prejudiced by the knowledge that a man accused of extortion had once been indicted for murder.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted: to resolve the issue of the constitutionality of the statutory presumption in 18 U.S.C. § 892(b); to determine, possibly, whether presumptions in criminal cases must meet the beyond-a-reasonable-doubt standard; and to decide whether upon request matters which cast doubt upon the reliability of evidence relating to past crimes or bad acts by a criminal defendant must be considered by a trial judge prior to ruling on the admissibility of that evidence.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the First Circuit

Nos. 76-1224 and 76-1225

UNITED STATES OF AMERICA,
APPELLEE,
v.
RICHARD DEVINCENT a/k/a VINNIE,
APPELLANT.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT VISCONTI,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CLARK*, *Associate Justice*, U.S. Supreme Court
(Ret.), and MCENTEE, *Circuit Judge*.

Brian J. McMenimen for Robert Visconti, appellant.
Stephen M. Salon, with whom Robert Erwin Silver, Andrej Thomas Starkis, and Salon, Silver, McCabe & Sidel were on brief for Richard DeVincent, appellant.
Dennis A. Winston, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney, Justice Department, and *Mervyn Hamburg*, Attorney, Department of Justice, were on brief, for appellee.

December 8, 1976

COFFIN, *Chief Judge*. The appellants were convicted of conspiring to make, and of making, an extortionate exten-

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* Sitting by designation.

sion of credit in violation of 18 U.S.C. § 892(a). The statute is a recent one, aimed at "loan sharks". Several of the issues raised by appellants revolve around the definition of an "extortionate" extension of credit. 18 U.S.C. § 891(6) states that

> "[a]n extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person reputation, or property of any person."

Recognizing that it might be hard to prove the "understanding of the creditor" directly, Congress declared in 17 U.S.C. § 892(b) that "if it is shown that all the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate . . . ." Congress then listed four factors: that repayment is unenforceable through civil judicial processes; that the loan requires interest greater than 45 per cent a year; that the loan, added to the borrower's existing debts to the same lender exceeds $100; and that the debtor reasonably believes either that the lender has used extortion to collect other debts or that the lender has a reputation for doing so.

The appellants argue that the district court improperly construed these provisions when it instructed the jury in the following language:

> "I want to tell you there are two ways in which the government can prove the extensions of credit were extortionate, if you find the extensions of credit were made: The government can prove extensions of credit were extortionate either by direct evidence of the ac-

> tual belief of Pallotta as to the defendants' collection practices or by establishing the following four facts:" [The court then paraphrased § 892(b).]

Appellants object that in outlining the first method of proof, the judge should have referred to the creditor's understanding that violence would be used to collect the loan. To prevail with this argument, they must show that the omission was plain error, for they made no objection when the instruction was given. F. R. Crim. P. 52(b). We agree that the statute makes the understanding of both the creditor and the debtor crucial to proving a substantive violation of this section. *Cf. United States* v. *Annoreno,* 460 F.2. 1303, 1310 (7th Cir.), *cert. denied,* 409 U.S. 852 (1972). We do not, however, believe that this instruction was plain error. Read as a whole, the charge to the jury conveyed the statute's requirements. At several earlier points in his instruction the judge properly charged that the government must prove the creditor's understanding. He talked of the "mutual understanding" of creditor and debtor, and of an "understanding between" the two.[1] Twice he repeated the statutory definition found in §891(6).[2] The judge's later lapse was, therefore, a harmless one. Particularly is this so when we consider the context of the remark: the court mentioned the "direct" method of proof under § 891(6) only as an introduction and contrast to the less direct route provided by § 892(b).

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[1] These instruction may have given the appellants more than they were due. The statute does not require a mutual agreement that force will be used to collect the debt; "understanding" is used in the sense of comprehension, not agreement. *United States* v. *Annoreno, supra,* 460 F.2d at 1308-09.

[2] These passages also dispose of appellants' argument that the jury was not informed that the creditor's understanding is a separate element of the crime and must be proven beyond a reasonable doubt. It is true that the instructions generally gave more attention to the debtor's understanding; but a reading of the record reveals that much of the defense was devoted to casting doubt on the debtor's claim that he expected violent collection tactics from these lenders. Understandably, the court's instructions reflect the focus of the parties.

Appellants also find error in the second part of the quoted passage, which is based on § 892(b). Their broadest ground is the unconstitutionality of the presumption[3] that these four factors show the loan to have been extortionate. There are constitutional limits on the use of presumptions in the criminal law. *Tot* v. *United States,* 319 U.S. 463, 467-68 (1943); *Leary* v. *United States,* 395 U.S. 6, 29-44 (1969). But the presumption created by § 892 does not transgress those limits. When a man with a reputation for violent collection tactics loans more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is "extortionate" within the meaning of § 892. Under either a rational connection or a reasonable doubt standard, the statutory presumption survives, for a juror presented with these basic facts could surely find the presumed fact beyond a reasonable doubt. *Cf. Turner* v. *United States,* 396 U.S. 398, 416 (1970); *Barnes* v. *United States,* 412 U.S. 837, 843 (1973).

Finally, appellants challenge the way in which the trial judge interpreted § 892. The court's instruction that the government "can prove" the loan extortionate by establishing the basic facts, they argue, may have misled the jury into thinking that its autonomy was limited. In fact, the jurors were free to ignore the presumption, even if they believed that the four basic facts had been proved. We agree that the judge's language was unfortunate; it would have been better to let the jury draw its own conclusions from the evidence without any prompting from Congress or the

[3] The statute speaks of "prima facie evidence" and not of a presumption. In an ideal statute, the two terms would have distinguishable meanings. *See, e.g.,* National Commission on Reform of Federal Criminal Laws, *Study Draft* §§ 103 (4) & (5), quoted in *Weinstein's Evidence* ¶ 303[8]. But Congress has not always observed the distinction in the past, and we have no assurance that this statute was drawn with it in mind. *Cf.* Advisory Committee's Note, Supreme Court Standard 303, quoted in *Weinstein's Evidence* ¶ 303. *See also* 1968 U.S. Code Cong. & Ad. News 2026-27.

court. And if the presumption had been mentioned at all, the jury should have been told that they were not bound by Congress's determination (although the basis of Congress's determination could have been explained). *United States* v. *Gainey,* 380 U.S. 63 (1965); *United States* v. *Crespo,* 422 F.2d 718 (2d Cir.), *cert. denied,* 398 U.S. 914 (1970). Nonetheless, the court was technically correct in saying that the government "can" prove its case against the appellants by establishing the four factors of § 892(b); we have already pointed out that finding these factors would justify a guilty verdict. Moreover, unlike the instruction in *United States* v. *Gainey, supra,* the judge's charge did not impinge on the appellant's Fifth Amendment privilege. Finally, taking the instruction as a whole, we do not think that this passage reduced the jurors' awareness of their responsibilities and discretion. Before the disputed remarks, the court had clearly set forth the "essential elements" of the crime,[4] and within minutes after the disputed remarks, the court repeated that the jury had a duty "to determine whether the government has proven what I told you were essential elements beyond a reasonable doubt."

The next error that the appellants find in the instructions is the statement that "[i]t is only necessary that the government prove that there will be a reasonable basis on which the borrower Peter Pallotta, could have based his fear that default or delinquency on his part could result in harm to him." Out of context, these words could be error, for they seem to permit a conviction if the debtor

[4] "There are three essential elements which must be proven beyond a reasonable doubt as to each defendant as to Count 2: First, that he made an extension of about $700 to Pallotta; secondly, that there was an understanding between the defendant and Pallotta, express or implied, tacit or otherwise, that if Pallotta delayed in making his repayments or there was a total failure to repay, that violence or other criminal means would be used to harm Pallotta; and, thirdly, in so doing the defendant acted knowingly, willfully and unlawfully."

had reasonable grounds for expecting violence — even if the debtor had no subjective expectation of violence. However, the judge did introduce a subjective element into the charge by speaking of "his" fear rather than "a" fear. The context further neutralizes any danger of misinterpretation. The preceding sentence was: "I want to instruct you . . . that the existence of explicit threats is not required in order for the government to prove the victim's understanding that there was a possibility of harm to him if he didn't make his payments." The judge was merely contrasting explicit threats with implicit ones. *United States* v. *Annoreno, supra,* 460 F.2d at 1309. In fact the judge was again being more generous than the statute might permit in requiring a reasonable basis for the debtor's understanding that default would be met with violence.

Appellants also find errors of omission in the charge. The chief government witness was an informer who had contradicted on the stand some of his earlier statements. The court cautioned the jury to weigh the credibility of each witness carefully, and to consider any interest the witness had in the outcome of the case. Appellants believe that these words were inadequate, but we see no error in refusing to give a more detailed charge on credibility. Contradictions in the witness's testimony were thoroughly explored on cross-examination, as was any possible bias arising from the witness's relationship with the government. Ordinarily the jury can be expected to take full account of such matters without more instructions than were given here. If the court had decided to give a more elaborate charge, we would not have disturbed his decision, but neither will we disturb his decision not to do so.

The court also refused to tell the jury that extortion, not usury, was the essence of the crime charged. Such an

instruction may be appropriate in some cases to avoid any confusion arising from the trial or counsels' arguments. But in this case, the high rate of interest received very little emphasis, while considerable attention was directed toward the appellants' threat of violence.

Appellants also contest several evidentiary rulings. The judge allowed testimony on appellant DeVincent's twenty-year-old conviction for armed robbery and his ten-year-old murder indictment. Normally, appellant's objections to this testimony would be well taken. Neither of the events could be admitted to show that DeVincent was a bad man. If known to the debtor, however, they can be admitted to show an element of the crime — the understanding of the debtor that default would be punished with violence. The debtor's awareness of the lender's earlier conviction, or even indictment, for a violent crime surely affects his view of the lender's likely collection practices. F.R.E. 404(b). Both of the revelations came while the debtor was being asked what he knew about the creditors at the time of the loan. Moreover, during this testimony the judge frequently warned the jury that the convictions and indictment were relevant only to the borrower's "frame of mind, in terms of whether or not he had an apprehension he would suffer if he didn't pay this loan. [The past acts are] admitted for no other purpose." We have qualms still, for this testimony was remote and cumulative; the debtor had already testified that he knew DeVincent as a "head-crusher, loanshark enforcer". He also testified that he knew DeVincent and Visconti had been convicted of loan-sharking. But the court, under these circumstances, may have reasoned that the testimony making these matters remote and cumulative also reduced their prejudicial impact. We cannot say the court committed reversible error in admitting the evidence or in refusing to consider

all testimony of this sort at a preliminary hearing, though the latter course might have avoided the present problem by revealing that the disputed evidence was redundant.

Appellants raise a number of other evidentiary issues. We have considered them carefully and find them to be without merit. The court's rulings were all proper exercises of a broad discretion. F.R.E. 403, 608(b); *United States* v. *Honneus*, 508 F.2d 566, 573 (1st Cir. 1974).

Affirmed.

Appendix B.

UNITED STATES CODE

TITLE 18

Crimes and Criminal Procedure

Chapter 42. Extortionate Credit Transactions

Section 891. Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.

Section 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.